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No. 00 – 957

IN THE

Supreme Court of the United States

In the Matter of the Care and Treatment of Michael T. Crane

STATE OF KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF PETITIONER

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159 pp

QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to prove that a sexually violent predator "cannot control" his criminal sexual behavior before the State can civilly commit him for residential care and treatment?

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OPINION BELOW

The July 14, 2000, decision of the Kansas Supreme Court is reported at 269 Kan. 578, 7 P.3d 285, and is included in the appendix to the State's petition for a writ of *certiorari* ("Pet. App.") at 2a-20a.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decision in this case on July 14, 2000. *See* Pet. App. 2a-20a. Kansas filed a timely petition for reconsideration which that court denied on September 26, 2000. Pet. App. 1a. Kansas filed its petition for a writ of *certiorari* on December 12, 2000, and this Court granted the petition on April 2, 2001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The "Due Process Clause" of the Fourteenth Amendment provides in pertinent part that

> nor shall any State deprive any person of . . . liberty . . . without due process of law . . . .

The Kansas Sexually Violent Predator Act, Kan. Stat. Ann. 1999 Supp. § 59-29a01 *et seq.*, is set forth in full in the appendix to this brief. Section 59-29a02(a) defines a "sexually violent predator" as

> any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.

The Act, in § 59-29a02(b), defines "mental abnormality" as

> a condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent

> offenses in a degree constituting such person a menace to the health and safety of others.

The Act defines the phrase "likely to engage in repeat acts of sexual violence," in § 59-29a02(c), to

> mean[] that the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.

STATEMENT OF THE CASE

1. *Nature of the Suit.* This case is an involuntary civil commitment proceeding against Michael Crane under the Kansas Sexually Violent Predator Act ("Act"). Kan. Stat. Ann. § 59-29a01 *et seq.* Most recently, Crane has prior convictions for lewd and lascivious behavior (exposing himself to a tanning salon attendant) and aggravated sexual battery (physically attacking a video store clerk, attempting to force her to perform oral sex, and threatening to rape her), arising from two separate incidents. Pet. App. 2a-3a. This civil commitment proceeding was initiated at the end of Crane's sentence on the latter charge. *Id.* at 3a. Ultimately, the trial court ordered Crane committed to a state facility for residential care and treatment. *Id.* at 25a. Crane appealed to the Kansas Supreme Court, which reversed the trial court on the ground that the State is constitutionally required to prove that Crane "cannot control" his criminal sexual behavior, and that the jury was not properly instructed on that issue in this case. *Id.* at 2a-20a.

2. *The Trial Court Proceedings.* Shortly after Crane's release from prison upon serving the sentence for his underlying offense, the State filed a petition seeking to have him adjudicated as a sexually violent predator. *See* Kan. Stat. Ann. §§ 59-29a03, 59-29a04 (set forth in the appendix to this brief ("Br. App.")), at 3a-5a. After a probable cause hearing, *see* Kan. Stat. Ann. § 59-29a05, Br. App. 6a, the trial court directed that Crane be sent to the Larned State Security

Hospital (a secure, mental health facility) to be evaluated by state mental health professionals, a procedure that is a feature of the Act. *See* Kan. Stat. Ann. § 59-29a05(d), Br. App. 6a.

a. *Crane's Evaluation.* Crane's evaluation was conducted by Dr. Leonardo B. Mabugat, a psychiatrist/M.D., and Mr. Kenneth Eaves, a licensed master's level psychologist. Their written evaluation, reprinted in full in the Joint Appendix ("J.A.") at 11-20, began with a discussion of the circumstances that led to Mr. Crane's most recent conviction, including his exposure of himself to a tanning salon attendant and his physical attack upon a video store clerk, when he forcibly "carried the victim to the back of the store, told her to engage in fellatio, and threatened to rape her." J.A. 12. The evaluation then detailed 18 other arrests, charges or convictions involving Crane and dating back to 1979, many of which were sexual in nature. J.A. 12-16. These included convictions for trespass, burglary, resisting police, felony theft, and sexual abuse in the first degree, as well as arrest or charges for indecent exposure (several times), sexual assault, felony attempted forcible rape, felony sexual abuse, and abuse of a child. J.A. 13-16. As the report notes, however, "Mr. Crane's aggression toward women appears not always to have been adjudicated as fact." J.A. 16.

The evaluation report further notes that, while in prison, Crane "completed thirty hours of group therapy" but that "he excluded discussions of his sexual and criminal behavior" and "has never participated in sex offender treatment." J.A. 17. The mental health professionals observed that Crane's "responses are logical and organized" and that he "is not preoccupied with delusions. Hallucinatory behavior is not evident. He is able to verbalize some insight into his behavior; however, he seems to minimize the seriousness of this illegal behavior." J.A. 18.

The evaluators' conclusion was that Crane meets the criteria under Diagnostic And Statistical Manual Of Mental

Disorders (4th ed. 1994) (American Psychiatric Association) ("DSM-IV") for "Exhibitionism and Antisocial Personality Disorder." J.A. 19. They continued that "[i]t is the opinion of the evaluating staff that Mr. Crane possesses a mental abnormality, Antisocial Personality Disorder, which would account for his aggression toward women. * * * This aggression has been sexual in that it has proceeded progressively from his exhibitionist behavior." J.A. 19-20. Thus, they concluded that if the sexual offenses listed earlier in the report (some of which involved only arrests or charges, not necessarily convictions) "are true, Mr. Crane is then considered to be a sexually violent predator." J.A. 20.

b. *The Constitutional Issue.* Crane repeatedly argued to the trial court that he could not be committed constitutionally absent a showing that he was totally unable to control his criminal sexual behavior. *See, e.g.,* Pet. App. 22a-23a. The trial court rejected his constitutional claim as follows:

> The Court finds the commission of a sexual crime and the existence of a mental abnormality or personality disorder which makes the person likely to engage in future predatory acts of violence are separate concepts and not interdependent upon one another in the sexually violent predator context. The Court denies Respondent's Motion for Summary Judgment stating as a matter of law that Respondent misinterprets the holding of *Kansas v. Hendricks*, by arguing the State must prove the existence of a mental disorder that so impairs the volitional control of Respondent as to render him unable to control his dangerous behavior. The Court holds the State must only prove the existence of a mental disorder that makes Respondent likely to reoffend.

Id. 23a (internal citations omitted).

c. *The Evidence At Trial.* The case then proceeded to trial. At trial, "the State presented evidence of Crane's

inappropriate sexual behavior on several occasions as well as the testimony of mental health professionals." Pet. App. 3a. In particular, the State presented four mental health witnesses, a psychiatrist (M.D.), two licensed master's level psychologists (LMLPs), and one doctorate level psychologist (Ph.D.). Crane presented no mental health witnesses.

The first mental health professional to testify, Robert Huerter (a LMLP), evaluated Crane in 1993 when Crane was charged with his most recent sexual offenses. J.A. 27-28. In particular, Huerter evaluated whether Crane might have suffered a "blackout" during the commission of the offenses. Huerter concluded that Crane did not, and that indeed he was aware of and understood what he was doing to the victim. J.A. 29-32.

The second mental health professional to testify was Leonardo Mabugat, a state psychiatrist. On direct examination, Dr. Mabugat testified that, although he had performed approximately ten predator evaluations by the time of the trial in this case, he had concluded that only Crane satisfied the Kansas statute's requirements for finding someone to be a sexually violent predator. J.A. 42-44. Dr. Mabugat further testified that Crane suffers from both Antisocial Personality Disorder and Exhibitionism, recognized mental disorders under the DSM-IV, at 525-26, 645-50. J.A. 44-51. Dr. Mabugat also testified that Crane is likely to reoffend if not treated in a secure facility. J.A. 50. Lastly, in response to a question whether Crane "can't control his behavior, or won't control his behavior," Dr. Mabugat responded that "it's a combination thereof." J.A. 51.

On redirect examination, Dr. Mabugat testified that both Antisocial Personality Disorder and Exhibitionism qualified as a "mental abnormality" under the Kansas statute, and that a person need not be psychotic or delusional when he commits a sexual offense to qualify as a sexually violent predator under the Kansas law. J.A. 71-72.

The third mental health professional to testify was Kenneth Eaves, a LMLP. He testified that he shared Dr. Mabugat's opinions that Crane suffers from Antisocial Personality Disorder and Exhibitionism, and that Crane is likely to reoffend if not kept in a secure facility for treatment. J.A. 89, 92. Mr. Eaves indicated that he initially had doubts that Crane qualified as a sexually violent predator under the Kansas law, but that he became convinced of Dr. Mabugat's diagnosis upon learning the full scope and extent of Crane's prior criminal history. J.A. 89-92.

The final mental health witness was Douglas Hippe, a licensed psychologist (Ph.D.). Dr. Hippe testified that he, like Mr. Huerter, had evaluated Crane in 1994 to ascertain whether Crane may have suffered from a blackout or other mental condition at the time he committed his most recent sexual offenses. J.A. 105-106. Dr. Hippe further testified that he had updated himself on Crane's status since then by reviewing Crane's most recent psychological records. J.A. 106-108. Dr. Hippe indicated that his diagnosis of Crane remained essentially the same from 1994 to 1998, J.A. 109, and that his conclusion was that Crane suffers from both Antisocial Personality Disorder, J.A. 110-116, and Exhibitionism. J.A. 116.

Dr. Hippe also testified that, although a diagnosis of Exhibitionism standing alone would not justify commitment as a sexually violent predator, J.A. 117, Crane satisfied the statutory requirements because his criminal sexual behavior was "of increasing frequency and particularly increasing intensity," showing "more of a disregard for the rights of others." J.A. 118. Dr. Hippe indicated that Crane's behavior was unlikely to improve without intensive, residential therapy, J.A. 118-120, and that he "would hesitate significantly to look at any kind of outpatient treatment" for Crane, as opposed to treating him in a secure facility. J.A. 120. Dr. Hippe testified that Crane is a "violent" offender and that he is very likely to

reoffend if not treated intensively in a secure setting. J.A. 121-122.

As the Kansas Supreme Court acknowledged, the State's mental health witnesses—including a psychiatrist and three psychologists—testified that Crane suffers from antisocial personality disorder and exhibitionism, with increasing frequency and intensity of his violent, criminal sexual behavior. Pet. App. 3a. Indeed, there is no dispute that the State presented substantial, largely uncontroverted evidence that (1) Crane suffers from both a mental disorder (Exhibitionism) and a personality disorder (Antisocial Personality Disorder) and (2) he is likely to reoffend if he does not undergo intensive, residential treatment in a secure setting.

d. *The Charge To The Jury.* In the jury instruction conference, Crane renewed his argument that the Constitution requires the State to prove that he is unable to control his criminal sexual behavior. J.A. 138-139. After a discussion with the attorneys on this question, *id.* at 139-141, the trial judge again ruled that the State need only prove that Crane is likely to reoffend, not an utter lack of volitional control. *Id.* at 142-143.

After closing arguments, the trial court then instructed the jury in part that, in order to establish that Crane is a sexually violent predator, the State must prove (*inter alia*) "[t]hat the respondent suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility." J.A. 156 (Instr. No. 7). The court further instructed the jury that "'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *Id.* (Instr. No. 9). Also, the jury was instructed that "'Personality disorder' means a condition recognized by the American Psychiatric Association

Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) [DSM-IV], and includes antisocial personality disorder." J.A. 157 (Instr. No. 9).

The jury then deliberated and responded "Yes" to the following special verdict question: "Is the respondent, MICHAEL T. CRANE, a sexually violent predator?" J.A. 158.

3. *The Kansas Supreme Court.* The Kansas Supreme Court began its discussion of the merits by stating that

> [T]he controlling issue is whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior. To answer that question, we must revisit *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Pet. App. 5a. The court then opined that "[t]he majority opinion, written by Justice Thomas, controls the result in this case." *Id.*

Looking at the majority opinion in *Hendricks*, the Kansas Supreme Court declared that Justice Thomas's opinion "is replete with references to the commitment of persons who cannot control their own behavior." Pet. App. 6a. The Kansas court quoted extensively from *Hendricks*, highlighting references to mental disorders that make it "'difficult, if not impossible, for the person to control his dangerous behavior'", "'criteria relating to an individual's inability to control his dangerousness'", and "'admitted lack of volitional control.'" *Id.* at 7a-8a (quoting *Hendricks*, 521 U.S. at 358, 360).

The Kansas Supreme Court then turned to the Kansas Act. The court observed that the Kansas law "does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression." Pet. App. 8a. Noting that the Kansas Act permits commitment when a sex offender's mental

abnormality affects "either emotional capacity or volitional capacity," *id.* at 9a, the Court concluded that "the result of the legislature's identifying emotional capacity as well as volitional capacity in the definition of mental abnormality was to include a source of bad behavior other than inability to control behavior." *Id.* The Court further noted that nothing in the Kansas law suggests a requirement that the State prove inability to control behavior when the person's diagnosis is for personality disorder rather than mental abnormality. *Id.*

Thus, concluding that state law does not require proof of inability to control behavior in this context, the Kansas court turned to Crane's constitutional argument and this Court's decision in *Hendricks*. First, the Kansas court opined that

> "[*i*]*n contrast to this court's* [the Kansas Supreme Court's] *focus on the Act's constitutionality, the Supreme Court's opinion* [in *Hendricks*] *seems to be much more specific to application of the Act to Hendricks.* The particular facts of Hendricks' case, including his conceding that he cannot control his urge to sexually molest children, was at the core of the Supreme Court's opinion.

Pet. App. 10a (emphasis added). Second, the Kansas Supreme Court asserted that

> A fair reading of the majority opinion in *Hendricks* leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To conclude otherwise would require that we ignore the plain language of the majority opinion in *Hendricks*.

Pet. App. 11a. The Kansas court once again pointed to language in Justice Thomas's opinion, specifically references to those "'who suffer from a volitional impairment rendering them dangerous beyond their control'", and a mental abnormality or personality disorder that "'makes it difficult, if

not impossible,' to control such behavior." *Id.* (quoting *Hendricks*, 521 U.S. at 358).

The Kansas court opined that, "[h]owever, in the present case, Crane suffers from a 'personality disorder,' which by definition does not include a volitional impairment." Pet. App. 11a-12a. Thus, the Court reversed the commitment order because the jury was not instructed that it had to find Crane had an "inability to control his behavior." *Id.* at 12a.

SUMMARY OF THE ARGUMENT

In 1997, this Court upheld the Kansas Sexually Violent Predator Act against sweeping substantive due process, double jeopardy and *ex post facto* challenges. *See Kansas v. Hendricks*, 521 U.S. 346 (1997); *see also Seling v. Young*, 531 U.S. 250 (2001). Importantly, the Court expressly held that the Act's premises for involuntary civil commitment of certain sex offenders—proof of (1) a "mental abnormality" *or personality disorder* and (2) dangerousness linked to such a mental problem—satisfied constitutional substantive due process requirements. *Id.* at 356-60. Nowhere in any of the *Hendricks* opinions did any member of the Court purport to favor a new rule of substantive due process that requires the State to prove—as a prerequisite to involuntary civil commitment—that a sexually violent predator "cannot control" his criminal sexual behavior. Nor does historical practice support such a requirement. Rather, there is simply no basis in law, medicine, policy or practice for such a constitutional requirement.

In addition to the Kansas Supreme Court's misreading of this Court's decision in *Kansas v. Hendricks*, there are at least two fundamental flaws in the Kansas court's apparent understanding of mental health diagnosis and treatment. First, some personality disorders are characterized, at least in part, by a degree of volitional impairment. Thus, the Kansas Supreme Court's opinion that personality disorders "per se" or

"by definition" do *not* involve volitional impairment is wrong as a matter of medical fact. Second, a "cannot control" standard has no basis in mental health diagnosis and treatment. The overwhelming weight of mental health authority would view virtually any person's behavior as falling along a continuum of volitional control, with even brutal, murderous sex offenders such as Jeffrey Dahmer and Ted Bundy exercising considerable volitional control over their heinous actions. Pursuant to the Kansas Supreme Court's nonsensical "cannot control" standard, even those two offenders could not have been involuntarily committed.

The Kansas Supreme Court's holding in this case, if not rejected, threatens to eliminate from the States' reach any sex offender—regardless of past history and likelihood of reoffending—whose primary or sole diagnosis involves impaired *emotional* rather than volitional capacity. The Kansas court's "cannot control" standard also will eliminate from residential treatment programs any offenders whose diagnoses involve only *partial* volitional impairment. Ironically, such offenders (like Michael Crane in this case) may be the ones most likely to succeed under intensive, residential care and treatment that teaches them to change and *control* their behavior.

ARGUMENT

I. THE COURT IN *KANSAS v. HENDRICKS* DID NOT CREATE A NEW "CANNOT CONTROL" REQUIREMENT IN THE CIVIL COMMITMENT CONTEXT, NOR IS A NEW DUE PROCESS STANDARD WARRANTED.

A. The Court Has Appropriately Taken A Deferential Approach To Substantive Due Process Claims In The Mental Health Context.

The Court could not have been more clear in *Kansas v. Hendricks*, 521 U.S. 346 (1997), when it declared that

> [W]e have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. * * * Legal definitions, however, . . . need not mirror those advanced by the medical profession.

521 U.S. at 359 (internal citations omitted). Moreover, the Court reiterated that differences of opinion among mental health professionals "do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes." *Id.* at 360 n.3.

The dissenting Justices in *Hendricks* also endorsed these fundamental principles. Discussing the significance of differences of medical opinion, Justice Breyer observed that

> [T]he very presence and vigor of this debate is important. The Constitution permits a State to follow one reasonable professional view, while rejecting another. The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds.

521 U.S. at 375 (Breyer, J., dissenting) (internal citations omitted).

Thus, the familiar starting point for the Court's analysis is that statutes properly enacted by state legislatures are presumed constitutional, *Heller v. Doe*, 509 U.S. 312, 319 (1993), unless they involve either fundamental rights or

suspect classes. *Id. See also City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). "So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). Importantly, in its substantive due process analysis, this Court traditionally pays "particular deference to reasonable legislative judgments," *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983); *see also Marshall v. United States*, 414 U.S. 417, 427 (1974), especially when expert opinions differ on important medical or scientific issues, such as what constitutes "mental illness" or an identifiable mental disorder. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

The Court traditionally has left the *substantive* aspects of state civil commitment statutes—as opposed to *procedural* requirements—to the States, with little federal constitutional limitation. "[T]his Court has *never* applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill." *Foucha v. Louisiana*, 504 U.S. 71, 119 (Thomas, J., dissenting). The question presented in this case involves only a substantive, and not a procedural, due process challenge to the Kansas statute. This is not surprising, given that the Kansas statute contains extensive procedural safeguards, including but not limited to the provision of counsel, the assistance of expert mental health professionals (at state expense, if necessary), the right to a jury trial and a requirement that the State prove its case beyond a reasonable doubt. *See* Kan. Stat. Ann. §§ 59-29a05(c)(1) (counsel), 59-29a06 (counsel, mental health expert, jury trial), 59-29a07 (proof beyond a reasonable doubt), Br. App. 6a-10a.

In cases involving substantive due process challenges to civil commitment systems, this Court has never gone further

than to require that the State prove that a person subject to commitment is both (1) "mentally ill" and (2) "dangerous." *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Seling v. Young*, 531 U.S. 250 (2001); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979); *Humphrey v. Cady*, 405 U.S. 504 (1972). Nor has the Court constitutionalized any particular definition of either "mental illness" or "dangerousness" as prerequisites to the invocation of state civil commitment proceedings.

Thus, the choices a state makes in this regard are classic legislative judgments that the Court historically has reviewed only for *reasonableness*. *See, e.g.*, *Hendricks*, 521 U.S. 346; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("the nature and duration of commitment [must] bear some *reasonable relation* to the purpose for which the individual is committed") (emphasis added); *see also O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 (1979).[1] *Hendricks* confirms that substantive due process notions only require that State legislatures choose between reasonable options supported by the legitimate judgments of mental health

[1] Indeed, in *Youngberg v. Romeo*, 457 U.S. 307 (1982), in addressing an involuntary civil committee's claim that he had due process rights to safe conditions and freedom from bodily restraint, the Court observed that liberty interests "are not absolute." *Id.* at 319-20. The Court declared that, "[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.'" *Id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). The Court then articulated a test, holding that "'the Constitution only requires that the courts make certain that professional judgment [of mental health professionals] in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.'" *Id.* at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980) (en banc) (Seitz, C.J., concurring)). The Court has also observed that "[w]e have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

professionals, especially when there may not be consensus on particular medical or scientific questions.[2]

> The Court has long recognized that
>
> The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised—for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity—reflects different combinations of distinct bases for commitment sought to be vindicated.

Jackson v. Indiana, 406 U.S. 715, 736-37 (1972) (footnotes omitted). Particularly when a state legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Marshall v. United States*, 414 U.S. 417, 427 (1974).

In addressing the substantive due process requirement of dangerousness—which is really the requirement at issue in this case—this Court has rejected the argument that legislative choices necessarily must be justified by empirical, scientific or medical evidence, rather than ordinary reasonableness:

> We do not agree with the suggestion that . . . power to legislate in this area depends on the research conducted by the psychiatric community. * * * The lesson we have drawn is not that government may not act in the face of

[2] The Court has recognized that psychiatry is not "an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985).

> this uncertainty, but rather that courts should pay particular deference to *reasonable* legislative judgments.

Jones v. United States, 463 U.S. 354, 365 n.13 (1983) (emphasis added).[3]

Thus, the Court consistently has taken a deferential approach to evaluating the constitutionality of the *substance* of the States' civil commitment standards. As the Court saw in *Hendricks*, significant differences of expert medical opinion exist with regard to some aspects of the diagnosis and

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[3] The "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge [of right and wrong] should determine criminal responsibility." *Leland v. Oregon*, 343 U.S. 790, 801 (1952). In rejecting the argument that the Constitution requires States to recognize alcoholism as a defense to a criminal charge of public intoxication, this Court warned that

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.
>
> Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. * * * [F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Powell v. Texas, 392 U.S. 514, 535-37 (1968) (Marshall, J.) (plurality opinion) (footnote omitted). *See also Montana v. Egelhoff*, 518 U.S. 37 (1996) (plurality opinion) (holding that due process does not require a State to permit a voluntary intoxication defense to a criminal charge).

treatment of the mental conditions afflicting many sex offenders. These differences of reputable medical opinion, however, do not constitutionally disable Kansas or the States from acting. Rather, the Court's traditional deference to the States' choices in dealing with mental health matters is absolutely proper and only logical as a constitutional matter. That is one of the lessons of the Court's decision in *Kansas v. Hendricks*, which expressly upheld the Kansas statute's reliance on the concepts of "mental abnormality or personality disorder."

Otherwise, the only realistic option is for this Court to impose a single civil commitment system on all of the States as a matter of federal constitutional law, something the Court long has declined to do, and with good reason. So long as there is a legitimate scientific and medical basis for the substantive requirements of a state's civil commitment scheme, substantive due process requirements are satisfied.

B. *Hendricks* Did Not Create A New Substantive Due Process Requirement For Civil Commitment.

1. The *Hendricks* Opinions Did Not Adopt A New Lack Of Volitional Control Requirement.

The Court's precedents in the civil commitment context—including its decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997)—uniformly recognize only two substantive due process requirements. First, there must be proof that the person is dangerous to himself or others. Second, that dangerousness must be linked to a significant mental problem.[4]

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[4] *Addington v. Texas*, 441 U.S. 418 (1979), held that to commit an individual to a mental institution in a civil proceeding the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others.

In *Hendricks*, eight Justices[5] agreed that the Kansas Sexually Violent Predator Act satisfies those two requirements. The division of opinion in *Hendricks* was over Hendricks' *ex post facto* challenge, not his substantive due process claims.

Indeed, in his concurring opinion, Justice Kennedy observed that "[a]s all members of the Court seem to agree, then, the power of the state to confine persons who, by reason of mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established." 521 U.S. at 372. Justice Breyer, who dissented on the *ex post facto* question, nonetheless concluded that the Kansas Act satisfied substantive due process principles. *See* 521 U.S. at 373 (Breyer, J., dissenting) ("I agree with the majority that the Kansas Act's definition of 'mental abnormality' satisfies the 'substantive' requirements of the Due Process Clause.").

Thus, in *Hendricks*, no Justice purported to hold that lack of volitional control is a federal constitutional requirement. There are indeed passing references in the majority opinion to a person's "inability to control" behavior, or "lack of adequate control," 521 U.S. at 357, 358, 362, 364, and in the dissent to "irresistible impulse." *Id.* at 375-76. It was, of course, not surprising that the Court mentioned lack of volitional control in *Hendricks*, since Mr. Hendricks had a primary diagnosis of pedophilia, a 40-year history of molesting children of all ages, and testified that he could not control his deviant impulses. But nothing in any of the opinions states, declares or holds that the Court was adopting a previously unknown substantive due process requirement regarding volitional control.

The Court has frequently emphasized historical practice in determining substantive due process limits on involuntary

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Foucha v. *Louisiana*, 504 U.S. 71, 75-76 (1992).

[5] Justice Ginsburg does not appear to have joined any opinion on the substantive due process issues. *See* 521 U.S. at 373.

restraint. The Kansas Supreme Court did not rely on history for the new "cannot control" rule, nor could it have done so. Rather, historical practice refutes any such requirement.

Although perceived lack of volitional control has certainly been *one* basis for civil commitment, it has by no means ever been the *only* basis.[6] Indeed, sources regarding eighteenth and nineteenth century practices and laws uniformly indicate that the States enjoyed wide latitude in determining the bases for civil commitment.[7]

Moreover, well-established practices such as quarantine,[8] for example, could not be justified on the ground that persons

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[6] *See, e.g.*, W. Blackstone, Vol. 1, *Commentaries on the Law of England* *304 (1765) (involuntary commitment justified for "lunatics," "persons under frenzies," those "who lose their intellects by disease," and those "judged by the court of chancery incapable of conducting their own affairs"); A. Deutsch, *The Mentally Ill in America* 418-422 (1937) (discussing the variety of common law bases for involuntary commitment in the last quarter of the eighteenth century and first half of the nineteenth century); *id.* at 422 (discussing the case of Josiah Oakes in 1845 in which "Chief Justice Shaw ruled that restraint of the insane was justified not only by regard for public or personal safety, but by considerations of remedial treatment"); G. Grob, *Mental Institutions in America: Social Policy to 1875* 9 (1973) (variety of bases in colonial times).

[7] *See, e.g.*, G. Grob, *Mental Institutions in America: Social Policy to 1875*, at 3, 132 (1973) (indicating that mental hospitals in the nineteenth century cared for a variety of individuals, including those "whose behavior was deemed socially disruptive by the community," "abnormal," or who "because of behavioral problems [were] deemed dangerous to the security either of the family or of society"); A. Deutsch, *The Mentally Ill in America* 418-422 (1937) (discussing the variety of common law bases for involuntary commitment in the last quarter of the eighteenth century and first half of the nineteenth century).

[8] T. Cooley, *A Treatise On The Constitutional Limitations Which Rest Upon The Legislative Power Of The States Of The American Union* 584 (1868) ("quarantine regulations and health laws" are an inherent part of the "police power of the States").

being quarantined for contagious diseases generally lack the ability to control their behavior. Yet the Court has expressly declared that involuntary quarantine for contagious diseases does not violate due process. *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. Of Health*, 186 U.S. 380 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases); *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 29 (1905) (holding that mandatory vaccinations do not violate due process, and noting that quarantine does not either); *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring) ("There can be little doubt that in the exercise of its police powers a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

2. Personality Disorders Can Justify Civil Commitment.

To the extent the Kansas Supreme Court held that a personality disorder, "by definition", can never satisfy substantive due process requirements, Pet. App. 11a-12a, that court was simply wrong. The American Psychiatric Association recognizes that "no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations." DSM-IV, at xxi.[9]

Indeed, the psychiatrists caution that there may be an "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis."

[9] DSM-IV defines "mental disorder" as "a clinically significant behavorial or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (*e.g.*, a painful symptom) or disability (*i.e.*, impairment in one or more important areas of functioning) or with a significantly increased risk of suffering, death, pain, disability or an important loss of freedom." DSM-IV, at xxi.

DSM-IV, at xxiii. To be sure, a "mental disorder" or "personality disorder" diagnosis does not alone necessarily

> imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.

Id. at xxvii. But that is why the Court in *Hendricks* reiterated that substantive due process requires that there be a finding of dangerousness linked to the person's mental problems.

Some personality disorders clearly justify involuntary civil commitment for residential care and treatment under this Court's decision in *Hendricks*. Indeed, the American Psychiatric Association states that "[a] Personality Disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress *or impairment*." DSM-IV, at 629 (emphasis added). Recognized personality disorders include Paranoid Personality Disorder, Schizoid Personality Disorder, Schizotypal Personality Disorder, Antisocial Personality Disorder (Crane's diagnosis in this case), Borderline Personality Disorder, Histrionic Personality Disorder, Narcissistic Personality Disorder, Avoidant Personality Disorder, Dependent Personality Disorder, Obsessive-Compulsive Personality Disorder, and Personality Disorder Not Otherwise Specified. *Id.*

Several personality disorders are characterized by impulsiveness, including Antisocial Personality Disorder, and thus volitional impairment, although that impairment may not

preclude such offenders from exercising *any and all* control over their criminal sexual behavior. *See* DSM-IV, at 629-73. Thus, the Kansas Supreme Court's holding in this case may preclude the commitment of some dangerous sex offenders with serious, diagnosed personality disorders, whose behavior might well be improved by intensive therapy that would teach them to *control* their deviant, sexual impulses.

For example, one of the diagnoses for Crane in this case—Antisocial Personality Disorder—has an "essential feature" of "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." DSM-IV, at 645. Moreover, DSM-IV's extensive description of this disorder indicates that such a diagnosis is very serious and often applies to a person who poses substantial risks of engaging in criminal acts that will harm others. For example, persons with this diagnosis "fail to conform to social norms with respect to lawful behavior," "may repeatedly perform acts that are grounds for arrest," "disregard the wishes, rights, or feelings of others," "are frequently deceitful and manipulative," "may repeatedly lie," "tend to be irritable and aggressive," and "may blame the victims for being foolish, helpless, or deserving their fate," among other endearing traits. *Id.* at 646.

Nor is Antisocial Personality Disorder a common diagnosis among the American population. DSM-IV indicates that the prevalence of Antisocial Personality Disorder "is about 3% in males and about 1% in females." DSM-IV, at 648.

This Court's decision in *Kansas v. Hendricks* established that proof of dangerousness (of which there is no question in this case) linked to a serious mental problem (such as Crane's diagnoses of Antisocial Personality Disorder and

Exhibitionism[10]) satisfies constitutional requirements in this context. The Kansas Supreme Court simply misread this Court's decision. Notably, in *Hendricks* this Court reversed the Kansas Supreme Court's earlier decision invalidating the Kansas law on substantive due process grounds similar to those upon which the Kansas court has once again seized in this case.

A fair reading of *Kansas v. Hendricks* demonstrates that this Court did not create a new substantive due process "cannot control" requirement. At most, the Court's references to lack of volitional control reflect the facts and circumstances of the case that was before the Court. Not a single Justice indicated that "inability to control" or proof of "irresistible impulse" was a substantive due process requirement, nor should they be.

Most lower state courts have correctly concluded that *Hendricks* did not create a new rule of substantive due process in the civil commitment context. Instead, they correctly read *Hendricks* as requiring only proof of (1) dangerousness, *i.e.*, a likelihood of reoffending, linked to (2) a serious mental problem. For example, in *In re Gordon*, 10 P.3d 500, 503 (Wash. App. Ct. 2000), the Court observed that "[l]ike the

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[10] "Exhibitionism" (a paraphilia) is characterized by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the exposure of one's genitals to an unsuspecting stranger" that "cause clinically significant distress or impairment in social, occupational, or other important areas of functioning." DSM-IV, at 526.

In discussing rape, a leading treatise on sex offenders states that the "cycle of ongoing urges, attempts to control them, breakdown of those attempts, and recurrence of the sex crime is similar to the clinical picture presented by exhibitionists, voyeurs, pedophiles, and other traditionally recognized categories of paraphiliacs." Gene G. Abel & Joanne L. Rouleau, *The Nature and Extent of Sexual Assault, in Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender* 18 (W.L. Marshall *et al.* eds., 1990).

Kansas statute," Washington's statute "requires the State to prove . . . that a causal link exists between an alleged sexual predator's mental abnormality or personality disorder and the likelihood that he or she will engage in predatory acts of sexual violence in the future." *Id.* at 503. Thus, the Court concluded that the Washington law

> therefore meets the *Hendricks* Court's requirement that civil commitment not be predicated on dangerousness alone. Contrary to Gordon's assertion, *Hendricks* does not require a jury to make a specific finding that the mental abnormality or personality disorder makes it impossible, or at least difficult, for an individual to control his dangerous behavior.

Id. Similarly, in *In re Varner*, 315 Ill. App. 3d 626, 637-38, 734 N.E.2d 226, 235-36 (2000), the court rejected arguments that substantive due process requires the State to prove either that a sex offender "lacks volitional control over his sexual behavior" or that "it was difficult if not impossible for the [offender] to keep himself from offending again."

In *People v. Hatfield*, 68 Cal. App. 4th 594, 80 Cal. Rptr. 268, 282 (1998), *review denied and opinion ordered not published* (Mar. 17, 1999), the California Court of Appeals declared that

> The essence of the due process requirement announced in *Hendricks* is a demonstrated, diagnosed impairment that makes the person likely to engage in dangerous sexually violent behavior in the future. It is the prediction of future dangerousness, whether due to inability to control behavior or a compelled choice so to act, that justifies civil commitment.

80 Cal. Rptr. at 282.

This Court should clarify that substantive due process does not impose a "cannot control" requirement.

C. A "Cannot Control" Requirement Has No Basis In The Diagnosis And Treatment Of Mental Problems.

There is simply no basis in medical or scientific fact for the Kansas Supreme Court's conclusion that the State must prove that a mentally disturbed sex offender "cannot control" his criminal sexual behavior in order to commit him. Virtually no one has complete and total lack of volitional control, even those who suffer from schizophrenia or serious psychoses. *See, e.g.*, Brief For The Association For The Treatment Of Sexual Abusers As *Amicus Curiae* In Support of Petitioner, in *Kansas v. Crane*, No. 00-957, at 3 (hereinafter "ATSA Brief") (quoting Christopher Slobogin, *An End To Insanity: Recasting The Role Of Mental Disability In Criminal Cases*, 86 Va. L. Rev. 1199, 1238 (2000) ("[A]s Morse and others have shown, even the most severely crazy people usually intend their acts and therefore have some control of them.").

Rather, the reason those opposed to sex offender civil commitment laws push for a "cannot control" standard is that virtually all diagnoses in the DSM-IV would fail to satisfy such a test, effectively eviscerating the laws.

Volitional impairment is a feature of many mental problems and disorders, but even some of the most troubled people are rational and calculating, at least some of the time, if not much of the time. Indeed, some of our country's most heinous sex offenders—people such as Jeffrey Dahmer and Ted Bundy—certainly did not have complete "inability to control" their murderous behavior. Rather, they were quite cunning and calculating, and both of them managed to avoid detection and prosecution for some time. Thus, held to the Kansas Supreme Court's "cannot control" standard, it is likely that a state could not prove that even offenders such as those two should be subject to involuntary civil commitment for residential care and treatment.

The medical and scientific reality, however, is that for virtually all people volitional control is a matter of degree that is impossible to measure or to establish. *See, e.g.,* ATSA Brief, at 2-6; Stephen J. Morse, *Crazy Reasons*, 10 J. Contemp. Legal Issues 189, 218 (1999). That uncontrovertible fact counsels in favor of constitutional standards that permit the States to exercise reasonable legislative judgment, not a federal requirement that is an impossible and unworkable standard.

It seems very unlikely that any reputable mental health professional would be willing to testify that anyone—including someone like Dahmer or Bundy—has an "utter" or "total" inability to, *i.e.,* "cannot", control their criminal sexual behavior. *See, e.g.,* ATSA Brief, at 2-6. Moreover, in discrediting the "irresistible impulse" theory of "insanity" in the criminal context, the American Psychiatric Association long has taken the position that the "'line between an irresistible impulse and an impulse not resisted' is indeterminate in practice and profoundly problematic in theory." Brief for the American Psychiatric Association in *Kansas v. Hendricks*, Nos. 95-1649, 95-9075, at 25 n.22 (quoting *APA Statement on the Insanity Defense*, 140 Amer. J. Psychiatry 681, 685 (1983)).[11] Rather, those suffering from mental disorders generally have neither an "utter" or "total" lack of control over their criminal behavior, nor do they perhaps have complete control. In other words, their disorders probably do affect their volitional and emotional capacity, but only to some greater or lesser *degree* which it is impossible to measure.

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[11] Defining the concept of "insanity"—both for legal and medical purposes—has long bedeviled both the lawyers and the mental health professionals. *See, e.g.,* A. Deutsch, *The Mentally Ill In America*, at 386 (1st ed. 1937) ("Indiscriminately used in both a medical and a legal sense, the word *insanity* lacks scientific sanction or precise meaning in either.") (emphasis original).

The Kansas Supreme Court's "cannot control" standard is simply unrealistic—even nonsensical—as a medical, scientific, and practical matter, even apart from the lack of any legal basis for such a standard in this Court's substantive due process precedents.

II. IF THE COURT CHOOSES TO CREATE A NEW SUBSTANTIVE DUE PROCESS STANDARD, IT SHOULD NOT REQUIRE MORE THAN PROOF OF "SOME" VOLITIONAL IMPAIRMENT.

Even those lower state courts that have created a new substantive due process requirement that the State make some showing regarding a sex offender's volitional impairment have generally required something less than "total" or "complete" lack of control. For instance, in *In re Linehan*, 594 N.W.2d 867, 875-76 (Minn. 1999), *cert. denied sub nom. Linehan v. Minnesota*, 528 U.S. 1049 (1999), a majority of the Minnesota Supreme Court rejected a "total" lack of control standard, and instead adopted a lack of "adequate" control requirement. The majority chastised the dissent for attempting to

> unreasonably narrow the *Hendricks* holding by inserting the word 'totally' in front of the word 'control' whenever it refers to the Supreme Court's analysis of a person's ability to control his or her sexual impulses. In doing so, the dissent overstates the *Hendricks* holding. *Hendricks* states that a person may be civilly committed if he suffers from a mental abnormality or personality disorder 'that makes [it] difficult, if not impossible, for the person to control his dangerous behavior.' Clearly this language does not require an utter lack of control over harmful behavior, but rather a lack of adequate control over harmful behavior.

Id. at 873 n.3.

To similar effect, see *In re Brooks*, 94 Wash. App. 716, 729, 973 P.2d 486, 492 (1999), (The *Hendricks* "Court did not

require, as Mr. Brooks asserts, a showing of a total lack of control. Rather, the person's mental abnormality or personality disorder must make it 'difficult, if not impossible, for the person to control his dangerous behavior'"), *review granted on other issues*, 138 Wash. 2d 1021, 989 P.2d 1136 (1999).

If the Court concludes that it should create an additional, new substantive due process requirement in this context, the standard should at least be a workable one that has some basis in medical and scientific fact. An "utter" or "total" lack of control requirement—*i.e.*, the Kansas Supreme Court's "cannot control" standard—has no such basis. It is uncontrovertible fact that, at least at this time, "'there is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of such capacity.'" Brief for the American Psychiatric Association in *Kansas v. Hendricks*, Nos. 95-1649, 95-9075, at 25 n.22 (quoting testimony of Professor Bonnie in S. Rep. 98-225, 98th Cong., 1st Sess. 225-229 (1983)).

A requirement that the State prove "some" volitional impairment, although not justified by current precedent nor by medical or scientific knowledge, would at least offer the States the possibility of committing dangerous sex offenders who suffer from significant personality disorders and who would greatly benefit from intensive, residential care and treatment. As explained above, any stricter requirement has no basis in this Court's precedents nor medical fact, and will be unworkable as a practical matter.

III. VIOLENT, RECIDIVIST SEX OFFENDERS SUCH AS CRANE CAN BENEFIT FROM RESIDENTIAL CARE AND TREATMENT.

Imposing a constitutional requirement that the state must prove a person "cannot control" his criminal, sexual behavior will severely and inappropriately restrict the class of dangerous

sex offenders subject to civil commitment for intensive, residential care and treatment. Many—if not *virtually all*—violent sex offenders have *some* ability to control their deviant sexual behavior; they simply *choose* not to, and in many cases those persons suffer from serious mental problems.

The result of the Kansas Supreme Court's ill-advised holding will be that many dangerous sex offenders who could benefit from intensive, residential therapy—indeed many who might be among those *most likely* to benefit, *see* ATSA Brief, at 7-10—and who pose a significant danger to the public will simply have to be released from state custody without such treatment. Many such offenders refuse to participate in prison treatment programs for various reasons,[12] and more are likely to refuse if there is no possibility that failure to engage in treatment can lead to civil commitment upon completion of their sentences.

Moreover, the treatment needs of sex offenders are often different than of those individuals committed under general civil commitment statutes. Some acutely psychotic conditions are responsive to various antipsychotic drugs, but typical sex

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[12] Another case currently pending before the Court implicates the interaction of incentives to participate in sex offender treatment programs in prison and civil commitment of violent, sex offenders following completion of their sentences. In *McKune v. Lile*, No. 00-1187 (*cert. granted*, May 14, 2001), the Court will consider "whether the revocation of correctional institution privileges violates the Fifth Amendment's privilege against self-incrimination where the inmate has no liberty interest in the lost privileges and such revocation is based upon the inmate's failure to accept responsibility for his crimes as part of a sex offender treatment program?"

Obviously, sex offender inmates who have meaningful incentives to participate in prison treatment programs—whether those incentives are the potential loss of prison privileges or the possibility of civil commitment at the end of the inmates' sentences—are much more likely to participate in such treatment in prison, a result that is in the best interests of both the offenders and the public.

offender conditions such as pedophilia, exhibitionism, and Antisocial Personality Disorder usually are not treated with medication.[13] Instead, recognized sex offender treatment techniques include behavioral reconditioning, relapse prevention, cognitive-behavioral strategies, enhancement of social skills, family systems approaches, and the addictive model. *See generally*

; Barbara K. Schwartz, *Effective Treatment Techniques for Sex Offenders*, 22 Psychiatric Annals 6 (June 1992); ATSA Brief, at 7-10.

None of the state sex offender civil commitment statutes now in existence require—as a statutory matter—proof that dangerous sex offenders with serious mental problems "cannot control" their criminal behavior, and with good reason. Adopting the Kansas Supreme Court's holding in this case will result in the immediate release (without further treatment) of many unquestionably dangerous and mentally disturbed sex offenders upon the general public.

Neither constitutional text, constitutional history, this Court's precedents, medical or scientific fact, legal necessity, practical considerations, public policy nor common sense require that result.

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[13] At this time, there is no consensus regarding drug therapy for violent, recidivist sex offenders. *See, e.g., The Antiandrogen and Hormonal Treatment of Sex Offenders*, in *Handbook of Sexual Assault* 297 (W.L. Marshall *et al.* eds., 1990).

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court reverse the decision of the Kansas Supreme Court, and reiterate that substantive due process principles require proof only of dangerousness linked to a serious mental problem.

Respectfully submitted,

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APPENDIX

KANSAS STATUTES ANNOTATED
CHAPTER 59.—PROBATE CODE
ARTICLE 29a.—COMMITMENT OF SEXUALLY VIOLENT PREDATORS

59-29a01. Commitment of sexually violent predators; legislative findings. The legislature finds that there exists an extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder. Because the existing civil commitment procedures under K.S.A. 59-2901 *et seq.* and amendments thereto are inadequate to address the special needs of sexually violent predators and the risks they present to society, the legislature determines that a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators is necessary. The legislature also determines that because of the nature of the mental abnormalities or personality disorders from which sexually violent predators suffer, and the dangers they present, it is necessary to house involuntarily committed sexually violent predators in an environment separate from persons involuntarily committed under K.S.A. 59-2901 *et seq.* and amendments thereto.

59-29a02. Same; definitions. As used in this act:

(a) "Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.

(b) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

(c) "Likely to engage in repeat acts of sexual violence" means the person's propensity to commit acts of sexual

violence is of such a degree as to pose a menace to the health and safety of others.

(d) "Sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

(e) "Sexually violent offense" means:

(1) Rape as defined in K.S.A. 21-3502 and amendments thereto;

(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;

(3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto;

(4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of K.S.A. 21-3505 and amendments thereto;

(5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto;

(6) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto;

(7) aggravated indecent solicitation of a child as defined in K.S.A. 21- 3511 and amendments thereto;

(8) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto;

(9) aggravated sexual battery as defined in K.S.A. 21-3518 and amendments thereto;

(10) aggravated incest as defined in K.S.A. 21-3603 and amendments thereto;

(11) any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent offense as defined in subparagraphs (1) through (11) or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this section;

(12) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 and 21-3303, and amendments thereto, of a sexually violent offense as defined in this subsection; or

(13) any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated.

(f) "Agency with jurisdiction" means that agency which releases upon lawful order or authority a person serving a sentence or term of confinement and includes the department of corrections, the department of social and rehabilitation services and the Kansas parole board.

(g) "Person" means an individual who is a potential or actual subject of proceedings under this act.

(h) "Treatment staff" means the persons, agencies or firms employed by or contracted with the secretary to provide treatment, supervision or other services at the sexually violent predator facility.

(i) "Transitional release" means any halfway house, work release or other placement designed to assist the person's adjustment and reintegration into the community once released from commitment.

(j) "Secretary" means the secretary of the department of social and rehabilitation services.

59-29a03. Same; notice of release of sexually violent predator by agency with jurisdiction to attorney general and multidisciplinary team, time, content; immunity from liability; establishing a multidisciplinary team; appointment of a prosecutor's review committee; assessment of person; provisions of section are not jurisdictional. (a) When it appears that a person may meet the criteria of a sexually violent predator as defined in K.S.A. 59-29a02 and amendments thereto, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection (d), 90 days prior to:

(1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense,

except that in the case of persons who are returned to prison for no more than 90 days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison;

(2) release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to K.S.A. 22-3305 and amendments thereto;

(3) release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to K.S.A. 22-3428 and amendments thereto; or

(4) release of a person who has been found not guilty of a sexually violent offense pursuant to K.S.A. 22-3428, and amendments thereto, and the jury who returned the verdict of not guilty answers in the affirmative to the special question asked pursuant to K.S.A. 22-3221 and amendments thereto.

(b) The agency with jurisdiction shall inform the attorney general and the multidisciplinary team established in subsection (d) of the following:

(1) The person's name, identifying factors, anticipated future residence and offense history; and

(2) documentation of institutional adjustment and any treatment received.

(c) The agency with jurisdiction, its employees, officials, members of the multidisciplinary team established in subsection (d), members of the prosecutor's review committee appointed as provided in subsection (e) and individuals contracting, appointed or volunteering to perform services hereunder shall be immune from liability for any good-faith conduct under this section.

(d) The secretary of corrections shall establish a multidisciplinary team which may include individuals from other state agencies to review available records of each person referred to such team pursuant to subsection (a). The team, within 30 days of receiving notice, shall assess whether or not the person meets the definition of a sexually violent predator,

as established in K.S.A. 59-29a02 and amendments thereto. The team shall notify the attorney general of its assessment.

(e) The attorney general shall appoint a prosecutor's review committee to review the records of each person referred to the attorney general pursuant to subsection (a). The prosecutor's review committee shall assist the attorney general in the determination of whether or not the person meets the definition of a sexually violent predator. The assessment of the multidisciplinary team shall be made available to the attorney general and the prosecutor's review committee.

(f) The provisions of this section are not jurisdictional, and failure to comply with such provisions in no way prevents the attorney general from proceeding against a person otherwise subject to the provision of K.S.A. 59- 29a01 *et seq.*, and amendments thereto.

59-29a04. Same; petition, time, contents; provisions of section are not jurisdictional. (a) When it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee appointed as provided in subsection (e) of K.S.A. 59-29a03 and amendments thereto has determined that the person meets the definition of a sexually violent predator, the attorney general may file a petition, within 75 days of the date the attorney general received the written notice by the agency of jurisdiction as provided in subsection (a) of K.S.A. 59-29a03 and amendments thereto, alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation.

(b) The provisions of this section are not jurisdictional, and failure to comply with such provisions in no way prevents the attorney general from proceeding against a person otherwise subject to the provision of K.S.A. 59- 29a01 *et seq.*, and amendments thereto.

59-29a05. Same; determination of probable cause, hearing; evaluation; person taken into custody. (a) Upon filing of a petition under K.S.A. 59-29a04, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made, the judge shall direct that person be taken into custody.

(b) Within 72 hours after a person is taken into custody pursuant to subsection (a), such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the detained person is a sexually violent predator. At this hearing the court shall: (1) Verify the detainer's identity; and (2) determine whether probable cause exists to believe that the person is a sexually violent predator. The state may rely upon the petition and supplement the petition with additional documentary evidence or live testimony.

(c) At the probable cause hearing as provided in subsection (b), the detained person shall have the following rights in addition to the rights previously specified: (1) To be represented by counsel; (2) to present evidence on such person's behalf; (3) to cross-examine witnesses who testify against such person; and (4) to view and copy all petitions and reports in the court file.

(d) If the probable cause determination is made, the court shall direct that the person be transferred to an appropriate secure facility, including, but not limited to, a county jail, for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.

59-29a06. Same; trial; counsel and experts; indigent persons; jury, composition, peremptory challenges. Within 60 days after the completion of any hearing held pursuant to K.S.A. 59-29a05 and amendments thereto, the court shall

conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. At all stages of the proceedings under this act, any person subject to this act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person. Whenever any person is subjected to an examination under this act, such person may retain experts or professional persons to perform an examination of such person's behalf. When the person wishes to be examined by a qualified expert or professional person of such person's own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the person's request, shall determine whether the services are necessary and reasonable compensation for such services. If the court determines that the services are necessary and the expert or professional person's requested compensation for such services is reasonable, the court shall assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred on behalf of the person and compensation received in the same case or for the same services from any other source. The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury. Such demand for the trial to be before a jury shall be filed, in writing, at least four days prior to trial. Number and selection of jurors shall be determined as provided in K.S.A. 22-3403, and amendments thereto. If no demand is made, the trial shall be before the court. A jury

shall consist of 12 jurors unless the parties agree in writing with the approval of the court that the jury shall consist of any number of jurors less than 12 jurors. The person and the attorney general shall each have eight peremptory challenges, or in the case of a jury of less than 12 jurors, a proportionally equal number of peremptory challenges.

59-29a07. Same; determination; commitment procedure; interagency agreements; mistrials; persons committed and later taken into custody after parole, arrest or conviction, procedure; persons found incompetent to stand trial, procedure. (a) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury. Such determination may be appealed. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services. At all times, persons committed for control, care and treatment by the department of social and rehabilitation services pursuant to this act shall be kept in a secure facility and such persons shall be segregated at all times from any other patient under the supervision of the secretary of social and rehabilitation services and commencing June 1, 1995, such persons committed pursuant to this act shall be kept in a facility or building separate from any other patient under the supervision of the secretary. The department of social and rehabilitation services is authorized to enter into an interagency agreement with the department of corrections for the confinement of such persons. Such persons who are in the

confinement of the secretary of corrections pursuant to an interagency agreement shall be housed and managed separately from offenders in the custody of the secretary of corrections, and except for occasional instances of supervised incidental contact, shall be segregated from such offenders. If any person while committed to the custody of the secretary pursuant to this act shall be taken into custody by any law enforcement officer as defined in K.S.A. 21-3110 and amendments thereto pursuant to any parole revocation proceeding or any arrest or conviction for a criminal offense of any nature, upon the person's release from the custody of any law enforcement officer, the person shall be returned to the custody of the secretary for further treatment pursuant to this act. During any such period of time a person is not in the actual custody or supervision of the secretary, the secretary shall be excused from the provisions of K.S.A. 59-29a08 and amendments thereto, with regard to providing that person an annual examination, annual notice and annual report to the court, except that the secretary shall give notice to the court as soon as reasonably possible after the taking of the person into custody that the person is no longer in treatment pursuant to this act, and notice to the court when the person is returned to the custody of the secretary for further treatment. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release. Upon a mistrial, the court shall direct that the person be held at an appropriate secure facility, including, but not limited to, a county jail, until another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the previous trial, unless such subsequent trial is continued as provided in K.S.A. 59-29a06 and amendments thereto.

(b) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be released pursuant to K.S.A. 22-3305 and amendments thereto, and such person's commitment is sought pursuant to

subsection (a), the court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on such person's own behalf, the extent to which the evidence could be reconstructed without the assistance of the person and the strength of the prosecution's case. If after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

59-29a08. Same; annual examinations; discharge petitions by persons committed under this act over the secretary's objection at time of annual examination, procedure; transitional release; violating conditions of release. (a) Each person committed under this act shall have a current examination of the person's mental condition made once every year. The person may retain, or if the person is indigent and so requests the court may appoint a qualified professional person to examine such person, and such expert or professional person shall have access to all records concerning the person. The yearly report shall be provided to the court that committed the person under this act. The court shall conduct an annual review of the status of the committed person. Nothing contained in this act shall prohibit the person

from otherwise petitioning the court for discharge at this hearing. The secretary of the department of social and rehabilitation services shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. The committed person shall have a right to have an attorney represent the person at the hearing but the person is not entitled to be present at the hearing.

(b) If the court at the hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be placed in transitional release, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The attorney general shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person on the person's behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be placed in transitional release and if transitionally released is likely to engage in acts of sexual violence.

(c) If, after the hearing, the court or jury is convinced beyond a reasonable doubt that the person is not appropriate for transitional release, the court shall order that the person remain in secure commitment. Otherwise, the court shall order that the person be placed in transitional release.

(d) If the court determines that the person should be placed in transitional release, the secretary shall transfer the

person to the transitional release program. The secretary may contract for services to be provided in the transitional release program. During any period the person is in transitional release, that person shall comply with any rules or regulations the secretary may establish for this program and every directive of the treatment staff of the transitional release program.

(e) At any time during which the person is in the transitional release program and the treatment staff determines that the person has violated any rule, regulation or directive associated with the transitional release program, the treatment staff may remove the person from the transitional release program and return the person to the secure commitment facility, or may request the district court to issue an emergency ex parte order directing any law enforcement officer to take the person into custody and return the person to the secure commitment facility. Any such request may be made verbally or by telephone, but shall be followed in written or facsimile form delivered to the court by not later than 5:00 p.m. of the first day the district court is open for the transaction of business after the verbal or telephonic request was made.

(f) Upon the person being returned to the secure commitment facility from the transitional release program, notice thereof shall be given by the secretary to the court. The court shall set the matter for a hearing within two working days of receipt of notice of the person's having been returned to the secure commitment facility and cause notice thereof to be given to the attorney general, the person and the secretary. The attorney general shall have the burden of proof to show probable cause that the person violated conditions of transitional release. The hearing shall be to the court. At the conclusion of the hearing the court shall issue an order returning the person to the secure commitment facility or to the transitional release program, and may order such other further conditions with which the person must comply if the person is returned to the transitional release program.

59-29a09. Detention and commitment to conform to constitutional requirements. The involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment.

59-29a10. Petition for transitional release; procedure. (a) If the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if placed in transitional release, the secretary shall authorize the person to petition the court for transitional release. The petition shall be served upon the court and the attorney general. The court, upon receipt of the petition for transitional release, shall order a hearing within 30 days. The attorney general shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of such attorney's choice. The hearing shall be before a jury if demanded by either the petitioner or the attorney general. The burden of proof shall be upon the attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if placed in transitional release is likely to commit predatory acts of sexual violence.

(b) If, after the hearing, the court is convinced beyond a reasonable doubt that the person is not appropriate for transitional release, the court shall order that the person remain in secure commitment. Otherwise, the court shall order that the person be placed in transitional release.

(c) The provisions of subsections (d), (e) and (f) of K.S.A. 59-29a08 and amendments thereto shall apply to a transitional release pursuant to this section.

59-29a11. Transitional release, conditional release or final discharge; subsequent discharge petitions,

limitations. Nothing in this act shall prohibit a person from filing a petition for transitional release, conditional release or final discharge pursuant to this act. However, if a person has previously filed a petition for transitional release, conditional release or final discharge without the secretary of the department of social and rehabilitation services approval and the court determined either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that the person was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.

59-29a12. Same; secretary of social and rehabilitation services; responsible for costs; duties; reimbursement. The secretary shall be responsible for all cost relating to the evaluation and treatment of persons committed to the secretary's custody under any provision of this act. Reimbursement may be obtained by the secretary for the cost of care and treatment, including placement in transitional release, of persons committed to the secretary's custody pursuant to K.S.A. 59-2006 and amendments thereto.

59-29a13. Same; notice to victims of release of persons committed under this act. In addition to any other information required to be released under this act, prior to the release of a person committed under this act, the secretary shall give written notice of such placement or release to any victim of the person's activities or crime who is alive and whose address is known to the secretary. Failure to notify shall

not be a reason for postponement of release. Nothing in this section shall create a cause of action against the state or an employee of the state acting within the scope of the employee's employment as a result of the failure to notify pursuant to this action.

59-29a14. Same; special allegation of sexual motivation; procedure; withdrawal or dismissal. (a) The county or district attorney shall file a special allegation of sexual motivation within 10 days after arraignment in every criminal case other than sex offenses as defined in article 35 of chapter 21 of the Kansas Statutes Annotated and amendments thereto, when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.

(b) In a criminal case wherein there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury, if it finds the defendant guilty, also shall find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in article 35 of chapter 21 of the Kansas Statutes Annotated and amendments thereto.

(c) The county or district attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

59-29a15. Same; severability. If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application and, to this end, the provisions of this act are severable.

59-29a16. Same; confidential or privileged information and records. In order to protect the public, relevant information and records which are otherwise confidential or privileged shall be released to the agency with jurisdiction or the attorney general for the purpose of meeting the notice requirement provided in K.S.A. 59-29a03 and amendments thereto and determining whether a person is or continues to be a sexually violent predator. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

59-29a17. Same; court records; sealed and opened by court order. Any psychological reports, drug and alcohol reports, treatment records, reports of the diagnostic center, medical records or victim impact statements which have been submitted to the court or admitted into evidence under this act shall be part of the record but shall be sealed and opened only on order of the court or as provided in K.S.A. 59-29a01 et seq. and amendments thereto. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

59-29a18. Conditional release; examination by staff; report; review and hearing by court; orders. (a) During any period the person is in transitional release, the person committed under this act at least annually, and at any other time deemed appropriate by the treatment staff, shall be examined by the treatment staff to determine if the person's mental abnormality or personality disorder has so changed so

as to warrant such person being considered for conditional release. The treatment staff shall forward a report of its examination to the court. The court shall review the same. If the court determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be placed in conditional release, the court shall then set a hearing on the issue. The attorney general shall have the burden of proof to show beyond a reasonable doubt that the person's mental abnormality or personality disorder remains such that the person is not safe to be at large and that if placed on conditional release is likely to engage in repeat acts of sexual violence. The person shall have the same rights as enumerated in K.S.A. 59-29a06 and amendments thereto. Subsequent to either a court review or a hearing, the court shall issue an appropriate order with findings of fact. The order of the court shall be provided to the attorney general, the person and the secretary.

(b) If, after the hearing, the court is convinced beyond a reasonable doubt that the person is not appropriate for conditional release, the court shall order that the person remain either in secure commitment or in transitional release. Otherwise, the court shall order that the person be placed on conditional release.

59-29a19. Conditional release; plan of treatment; minimum term; hearing for final release; violating conditions of plan or release. (a) If the court determines that the person should be placed on conditional release, the court, based upon the recommendation of the treatment staff, shall establish a plan of treatment which the person shall be ordered to follow. This plan of treatment may include, but shall not be limited to: Provisions as to where the person shall reside and with whom, taking prescribed medications, attending individual and group counseling, maintaining employment, having no contact with children, not frequenting facilities, locations, events or otherwise in which children are likely to

be present and not engaging in activities in which contact with children is likely. Upon a showing by the person that the person accepts the plan of treatment and is prepared to follow it, the court shall release the person from the transitional release program.

(b) After a minimum of five years have passed in which the person has been free of violations of conditions of such person's treatment plan, the treatment staff, or other professionals directed by the court may examine such person to determine if the person's mental abnormality or personality disorder has changed so as to warrant such person being considered for final discharge. The person preparing the report shall forward the report to the court. The court shall review the same. If the court determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be entitled to final discharge, the court shall set a formal hearing on the issue. The attorney general shall have the burden of proof to show beyond a reasonable doubt that the person's mental abnormality or personality disorder remains such that such person is not appropriate for final discharge. The person shall have the same rights as enumerated in K.S.A. 59-29a06 and amendments thereto. Subsequent to either a court review or a hearing, the court shall issue an appropriate order with findings of fact. The order of the court shall be provided to the attorney general, the person and the secretary.

(c) If, after a hearing, the court is convinced beyond a reasonable doubt that the person is not appropriate for final discharge, the court shall continue custody of the person with the secretary for placement in a secure facility, transitional release program or conditional release program. Otherwise, the court shall order the person finally discharged. In the event the court does not order final discharge of the person, the person still retains the right to annual reviews.

(d) At any time during which the person is on conditional release and the professional person designated by the court in

the treatment plan to monitor the person's compliance with it determines that the person has violated any material condition of that plan, that professional person may request the district court to issue an emergency ex parte order directing any law enforcement officers to take the person into custody and return the person to the secure commitment facility. Any such request may be made verbally or by telephone, but shall be followed in written or facsimile form delivered to the court not later than 5:00 p.m. of the first day the district court is open for the transaction of business after the verbal or telephonic request was made.

(e) Upon the person being returned to the secure commitment facility from conditional release, notice thereof shall be given by the secretary to the court. The court shall set the matter for a hearing within two working days of receipt of notice of the person's having been returned to the secure commitment facility and cause notice thereof to be given to the attorney general, the person and the secretary. The attorney general shall have the burden of proof to show probable cause that the person violated conditions of conditional release. The hearing shall be to the court. At the conclusion of the hearing the court shall issue an order returning the person to the secure commitment facility, to the transitional release program or to conditional release, and may order such other further conditions with which the person must comply if the person is returned to either the transitional release program or to conditional release.

(f) The final discharge shall not prevent the person from being prosecuted for any criminal acts which the person is alleged to have committed or from being subject in the future to a subsequent commitment under this act.

59-29a20. Bail, bond, house arrest or other release; not eligible. Any person for whom a petition pursuant to this act has been filed and is in the secure confinement of the state shall not be eligible for bail, bond, house arrest or any other

measures releasing the person from the physical protective custody of the state, notwithstanding the provisions of K.S.A. 59-29a10 and amendments thereto.